# INFORMATION

FOR

DAVID KERR Farmer and Merchant in *Innerkip*, *Thomas Orr* Farmer in *Nethertown* of *Innerkip*, *John Hair* Merchant in *Innerkip*, *Alexander Boag* in *Hill* near *Innerkip*, *Thomas Reid* Weaver in *Innerkip*, *Robert Hyndman* Residenter there, and *John Hunter* Cooper there, Pannels;

AGAINST

His Majesty's Advocate, for his Majesty's Interest, Prosecutor.

THE pannels are accused of sundry acts of violence, committed with a view to obstruct the making and securing a seizure, both upon the common law, and upon the statute of the 8th year of the reign of *George* I. entitled *An act to prevent the running of goods, and the danger of infection thereby*, &c. which punishes certain offences therein mentioned, as felony, by transportation to one of his Majesty's colonies in *America*, for the space of seven years, and in case of return from transportation within that time, inflicts the pain of death.

The pannels have appeared in court to answer this accusation; and having pleaded not guilty, sundry defences have been proponed for them; and, after a hearing, your Lordships having ordered informations, in consequence of that appointment, this is offered on the part of the pannels.

The defences against this libel, as laid on the statute 8*vo* *George* I. and as laid at common law, will merit very different considerations; the argument on each, therefore, shall be stated separately. And in the *first* place, it shall be attempted to be shown, that the clause of the statute on which the libel is laid, does not apply to the facts set furth in the libel.

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The meaning of the ſtatute, as interpreted by his Majeſty's Advocate, is ſaid to be, to puniſh the ſimple act of reſiſtance to a revenue officer, in making or ſecuring a ſeizure, as felony, by tranſportation for ſeven years, not to return under the pain of death.

On the other hand, it is pleaded for the pannels, that, by this clauſe of the ſtatute on which the libel proceeds, it is not meant to puniſh the ſimple act of reſiſtance, but to puniſh the act of carrying prohibited or uncuſtomed goods from the coaſt to any place within the kingdom, or from one part of the kingdom to another, within 20 miles of the coaſt, joined with certain alternatives, of which the reſiſting or hindering of officers of the revenue in making or ſecuring a ſeizure is one; and that the ſimple act of reſiſtance, when not ſo qualified, is puniſhable by an after clauſe of the ſtatute, by a pecuniary mulct of 40 *l. Sterling*, recoverable only in exchequer.

In order to argue on this matter with the greater preciſion, it will be neceſſary to tranſcribe at length, both clauſes of the ſtatute.

The one, on which the libel proceeds, is the 6th ſection, and is in theſe words, " And be it further enacted by the authority fore-
" ſaid, that from and after the ſaid 25th day of *March* 1722, all
" and every perſon and perſons, who ſhall be found paſſing
" (knowingly and wittingly) with any foreign goods or commo-
" dities, landed from any ſhip or veſſel without the due entry,
" and payment of the duties by law charged thereon, in his, her
" or their cuſtody, from any of the coaſts of this kingdom, or
" within the ſpace of twenty miles of any of the ſaid coaſts,—
" and ſhall be more than five perſons in company,—or ſhall car-
" ry any offenſive arms or weapons,—or wear any vizard maſk,
" or other diſguiſe when paſſing with ſuch goods or commodities,
" as aforeſaid;—or ſhall forcibly hinder or reſiſt any of the offi-
" cers of the cuſtoms or exciſe, in the ſeizing or ſecuring any
" ſorts or kinds of run goods or commodities, ſhall be deem-
" ed and taken to be runners of foreign goods and commodities,
" within the meaning of this preſent act, and (being convicted
" of, or for any of the ſaid offences, for which he, ſhe or they ſo
" convicted, are, by this preſent act, declared to be deemed and
" taken to be runners of foreign goods and commodities,) ſhall
" be

" be adjudged guilty of felony; and ſhall, for his, her or their " offence, be tranſported as a felon, *&c.*"

The other clauſe of the act relative to reſiſtance, is the 25th ſection, which runs thus, " And be it further enacted by the authority " foreſaid, that if, from and after the 25th day of *March* 1722, " any perſon or perſons whatſoever, ſhall aſſault, reſiſt, oppoſe, " moleſt, obſtruct or hinder any officer, or officers of cuſtoms or " exciſe, in the due ſeizing or ſecuring any brandy, arrack, rum, " ſpirits or ſtrong waters, either foreign or *Britiſh*, or any foreign ex- " ciſeable liquors, which, by any officer or officers of cuſtoms or " exciſe, ſhall or may be ſeized, by virtue, or in purſuance of this " or any other act, or acts now in force, or hereafter to be made, " or ſhall by force or violence reſcue, or ſhall cauſe or procure to " be reſcued, any brandy, arrack, rum, ſpirits or ſtrong waters, " *Britiſh* or foreign, or any foreign exciſeable liquors, after the " ſame ſhall have been ſeized by ſuch officer or officers as afore- " ſaid, or ſhall attempt or endeavour ſo to do, or ſhall at or after " ſuch ſeizure, ſtave, break, or otherwiſe deſtroy or damage a- " ny caſk, veſſel or bottle, containing ſuch brandy, arrack, rum, " ſpirits or ſtrong waters, *Britiſh* or foreign, or ſuch foreign ex- " ciſeable liquor, the party or parties ſo offending, ſhall, for eve- " ry ſuch offence, forfeit and loſe the ſum of 40 *l.*"

By ſection 23d it is enacted, " That the ſeveral penalties and for- " feitures in this act mentioned, ſhall and may be proſecuted and " determined by bill, plaint or information, in any of his Majeſty's " courts of record at *Weſtminſter*, or in the court of exchequer at " *Edinburgh*, reſpectively, (except where it is in this act otherwiſe " directed,) wherein no eſſoign, protection, or wager of law ſhall be " allowed: And one moiety of the ſaid ſeveral penalties and for- " feitures ſhall be to the uſe of his Majeſty, his heirs and ſucceſ- " ſors, and the other moiety to ſuch perſon or perſons as will ſue " for or proſecute the ſame."

In the firſt of theſe clauſes, which is that on which the preſent libel is laid, it ſeems to have been the meaning of the legiſlature, to puniſh four different offences; the firſt of theſe is the paſſing, knowingly and witingly, with any foreign goods or commodities, landed from any ſhip or veſſel, without due entry and payment of the duties by law charged thereon, in their cuſtody, from any of the coaſts of this kingdom, or within the ſpace of 20 miles of any of the ſaid coaſts; if the ſaid paſſing ſhall be by five perſons

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or more in company. The next offence is, the paſſing knowingly and wittingly, *&c.* if the perſons ſo paſſing ſhall carry any offenſive arms or weapons. The third offence is, the paſſing knowingly and wittingly, *&c.* the perſons ſo paſſing, wearing a vizard maſk or other diſguiſe. And the fourth offence is, paſſing knowingly and wittingly, *&c.* if the perſons ſo paſſing, ſhall forcibly hinder or reſiſt any of the officers of the cuſtoms or exciſe, in the ſeizing or ſecuring any ſorts or kinds of run goods or commodities.

That this is the natural interpretation of this clauſe, ſeems plain from a variety of circumſtances; and that it is the legal ſenſe of the act, it ſhall be the endeavour of the pannels to ſhow.

The purpoſe and intent of this ſtatute, both from the rubrick and preamble, appears not to have been ſolely confined to the preventing of ſmuggling, or ſecuring the public revenue; theſe ſeem to have been but ſubordinate and inferior purpoſes in the eye of the legiſlature. The great end of the ſtatute ſeem to have been to prevent infection by the plague, which was then raging in other parts of *Europe*; and as that infection would moſt probably be brought to *Britain* by means of ſmuggling veſſels, which could not be put under the ſame regulations as veſſels in a fair and open trade, by performing quarantine, *&c.* it became neceſſary to impoſe ſevere penalties on thoſe practices of ſmugglers, which might tend to communicate the infection.

The ſmuggling practices, from which the infection was moſt to be dreaded, was the conveying ſmuggled goods from the ſhore into the country, and effectuating ſuch conveyance by force, or doing it in ſuch a manner, that the actors of it could not be diſtinguiſhed. By the firſt, all attempts to keep the danger of infection from the inland country, would be ineffectual: By the latter, the ſpreading of the infection, if carrried there, could not be prevented: For, if a perſon who was known to have come from foreign parts, where the infection prevailed, attempted to go into the country, the country, for their own ſafety, would lay hold of him, and carry him back to perform quarantine; but this remedy could not be applied, if he was permitted to diſguiſe himſelf on the road.

Accordingly the legiſlature, in the clauſe of the ſtatute now under conſideration of your Lordſhips, hath thought proper to puniſh the paſſing of ſmugglers, by which the infection might be

be communicated, either when attended with ſuch circumſtances, as might indicate an intention to force their way into the country, or as might render the diſcovery of the perſons concerned difficult.

That this is the meaning of the act in this clauſe, ſeems evinced from the rubric itſelf, where the act is entitled, " An act to pre- " vent the clandeſtine running of goods, and the danger of infection " thereby; and to prevent ſhips breaking their quarantine, and to " ſubject copper-ore, *&c.*" Accordingly, the act begins with certain regulations about the ſize of veſſels, in which foreign goods are to be imported; it then proceeds to the clauſe under your Lordſhips conſideration, and ſome other regulations about the purchaſing and vending run goods; it next regulates the quarantine to be performed by all veſſels, and ſo proceeds to the regulations concerning copper-ore. Now, as each of the other purpoſes mentioned in the rubric of the act, are provided for in the order in which they occur in the rubric itſelf, as no expreſs means for preventing infection, are pointed out in the act, as the place where ſuch regulations ought to be found, appears, by the rubric, to be betwixt the regulations againſt clandeſtine running of goods, and thoſe about performing quarantine; and as nothing occurs there but the clauſe libelled, and the regulations about purchaſing and ſelling goods, ſo, it muſt be preſumed, that that is the part of the act which was meant to prevent the danger of infection, by the running of goods.

By this interpretation of the law, as the capital thing to be feared in communicating infection, was the act of paſſing from the coaſt, or near it with ſmuggled goods; this, therefore, muſt conſtitute the eſſence of the crime meant to be puniſhed, and muſt be joined with one or other of the alternatives, mentioned in the after part of the clauſe, before any of theſe alternatives can be founded on in a criminal proſecution.

That this act of parliament was meant chiefly to prevent infection from the plague, and that the benefit of the revenue was only a ſecondary view of the legiſlature, appears further, from its being only a temporary law: Its endurance was at firſt but for two years; it has been continued from time to time by ſundry acts of parliament, ſometimes for two, ſometimes for three, ſometimes for four, and ſometimes for five years, and once was permitted to expire altogether, for the ſpace of two years; at preſent,

it ſtands continued only till the year 1767. Now, the benefit of the revenue being a perpetual object, had that been chiefly in view of the legiſlature, the law would have been perpetual; but, as the danger of infection from the plague is but a temporary evil, ſo it has been remedied by a temporary law, which, as the danger was more or leſs apparent, has been continued for longer or ſhorter times.

But, abſtracting from the ſpirit of this act itſelf, it is farther contended, that the clauſe under conſideration of your Lordſhips, cannot receive the ſenſe put upon it on the part of the proſecutor, by the general rules of interpreting laws. *In pœnalibus cauſis benignius interpretandum eſt*, ſays the law, *L.* 155. § 2. *ff. de reg. jur.* and *interpretatione legum, pœnæ molliendæ ſunt potius quam aſperandæ*, *L.* 42. *ff. de pœnis.* But to prove that criminal law ſhould always be interpreted in the moſt gentle ſenſe, hardly any authority need be quoted, eſpecially in a free country; it is a principle of common ſenſe, and of humanity, and the ſpirit of liberty is nothing elſe than the moſt diffuſive ſpirit of humanity. The law in queſtion, it ſeemed acknowledged by the proſecutor, was inaccurately worded, or in other words, is ambiguous; and if ambiguous, the *lenior interpretatio* muſt take place: No one of the alternatives mentioned in the ſtatute, taken ſeparately, can be interpreted to infer the pains enacted; but one or other of them muſt be joined with the act pointed at in the beginning of the clauſe, in order to conſtitute the crime meant to be puniſhed.

And this interpretation of the act naturally leads to the conſideration of the 25th clauſe, where the crime libelled, *viz.* Simple reſiſtance, is declared puniſhable by a pecuniary mulct: It is an old maxim, that *incivile eſt, niſi tota lege perſpecta, ſententiam dicere*; and ſurely, if ever that maxim was neceſſary to be attended to, it is in the preſent caſe. This clauſe ſeems to leave the meaning of the former one without doubt: For, ſuppoſing the meaning of the former clauſe of the act ambiguous, and that it ſhould be doubtful, whether it meant to puniſh the act of reſiſtance, unattended with any other circumſtance; yet, when by this after clauſe it appears, that the legiſlature had impoſed a ſpecial penalty upon the ſimple act of reſiſtance, of a much lower nature than the puniſhment impoſed by this clauſe, it will then be evident, that the legiſlature, in impoſing a higher penalty, had ſomething more in view, than to puniſh the ſimple act; and when the ſenſe of the words will bear, that they meant to puniſh

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it, when peculiarly aggravated, the puniſhment impoſed will be confined to the caſe of ſuch aggravation only.

There is not, perhaps, an inſtance in the whole body of our ſtatutes, or of the laws of other countries, of a penal law, which has impoſed two diſtinct penalties on one and the ſame crime, without any variation in circumſtances; and ſuch an idea ſeems totally inconſiſtent with the nature of criminal law in general, but particularly, with the nature of criminal law in a free country. Penal laws are intended for amendment; and, for example, they amend the manners of the people, by ſhowing them, that criminal acts muſt have penal conſequences; and example is only profitable, in ſo far as it ſhows the certainty of ſuch conſequences, if the crimes are committed; but by impoſing ſeparate penalties upon the ſame crime, very different in their degrees of ſeverity, the conſequences of the criminal act are left uncertain, and even example, in ſuch a caſe, loſes its effect. Indefinite powers in matters criminal, are the moſt dreadful inſtruments of oppreſſion, and contrary to the very nature of law, which is intended for the protection and ſecurity of individuals; but, by giving ſuch powers, it fills their minds with diſquiet and diſtruſt, and renders them altogether unſecure.

It has been argued on the part of the proſecutor, that as the conſequences of reſiſtance made to officers of the revenue, might not always be equally pernicious, and as the circumſtances attending them might not always be equally criminal, it is proper that a diſcretionary power ſhould be lodged ſomewhere, with regard to the execution of the laws intended to puniſh ſuch reſiſtance; and that, accordingly, a diſcretionary power has, by this ſtatute, been lodged with his Majeſty's Advocate, who alone can proſecute theſe crimes, and who muſt be preſumed to be always a perſon of ſuch a character as the diſcretionary powers may ſafely be intruſted with him.

To this it is anſwered, that the diſcretionary powers here contended for, are neither conſiſtent with the genius of theſe times, nor with the ſpirit of our laws: The public proſecutor is a neceſſary office, but it is an office which requires the utmoſt delicacy in the execution of it: And the law, far from intruſting it with diſcretionary powers, has ſhown itſelf remarkably jealous and watchful over the powers, which, of neceſſity, muſt belong to the office. Hence, in every caſe, the preſumptions are in favour of the pannel; and, wherever matters admit of doubt, every

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thing is given againſt the public proſecutor. It is a maxim of a very learned and wiſe author, *optima illa lex quæ minimum relinquit judici, optimus judex qui minimum ſibi*; and if ſuch a maxim is applicable to the office of a judge, much more muſt it be applicable to the office of a proſecutor.

The law, in giving diſcretionary powers, has never been in uſe to intruſt them with parties; it is the judge only with whom they are intruſted in caſes where they are indulged at all. The only diviſion of puniſhments known in the law, are capital, ſtatutory, and arbitrary. In the two former of theſe, the duty both of judge and proſecutor is preciſely marked out to them: In the latter, the diſcretionary powers are permitted to the judge only; who, from the circumſtances of the caſe, determines the extent of the puniſhment, and there the proſecutor has no concern.

But the powers conveyed by this ſtatute, according to the argument of the proſecutor, are not diſcretionary, but arbitrary: For, in fact, there is the choice of two puniſhments permitted to him, without any diſtinction as to circumſtances; and he may inſiſt for which he pleaſes. This power can ſerve no good purpoſe in itſelf, tho' caſes might be figured where it would prove a moſt dreadful inſtrument of oppreſſion.

But, in the *ſecond* place, it will be found, that from the ſtatute itſelf there is no room for the argument of the proſecutor, and that the diſcretionary powers pleaded in favours of my Lord Advocate, cannot, by that ſtatute, be exerciſed by him.

The act in queſtion is an act extending to the whole united kingdom; conſequently, proſecutions upon this act are competent, both in *England* and in *Scotland*; and if it can be ſhown, that there is no room for diſcretionary powers in the execution of that act in *England*, it will not be preſumed, that any ſuch diſcretionary powers were intended to take place in *Scotland*.

By the law of *England*, crimes may be brought to trial in three ways. In the *firſt* place, upon the preſentment of a grand jury, to whom any perſon may accuſe without the aid of any public officer; and, if they find a bill, the trial muſt go on. In the *ſecond* place, by an information filed by the maſter of the crown-office, upon leave of the court of king's bench. And, in the *third* place, upon an information filed in the court of king's bench by the attorney-general *ex officio*. The firſt of theſe methods

thods of bringing on proſecutions, is called, in *England*, the ordinary method: The other two are called extraordinary: And accordingly, the extraordinary methods are very ſeldom uſed, as the ordinary one is deemed the moſt conſtitutional.

It is plain, that in the firſt of theſe methods of bringing on a proſecution, which is competent in the caſe of all crimes whatever, there is no room to ſuppoſe that a diſcretionary power exiſts any where. It is moſt certain, that *quilibet e populo* may prefer a bill againſt any perſon whatever, accuſing him of a crime to a grand jury, which always attends during the ſitting of the king's courts; and, upon the grand jury finding ſuch a bill, *billa vera*, trial muſt proceed in the king's name, tho' the perſon, who preſented the bill, is only anſwerable for the conſequences if the accuſation ſhall turn out calumnious: There is therefore no diſcretionary powers lodged with the attorney-general, or any other perſon, to direct in what manner that proſecution is to proceed, or what are to be the concluſions of it.

With regard to the *ſecond* method of entering a proſecution, there is indeed a diſcretionary power as the law ſtands at preſent; but that diſcretionary power is lodged in the court only. Indictments filed by the maſter of the crown-office, *ex officio*, which were permitted formerly, became perfect nuiſances; for, as they brought a perquiſite of office along with them, none were refuſed: But the legiſlature thought fit to interpoſe; and, as the law ſtands now, no information can be filed by the maſter of the crown office, but by the leave of the court: In which caſe, a rule of court is obtained for citing the perſon accuſed, to ſhow cauſe why ſuch an information ſhould not be filed; and accordingly, as he ſhows cauſe or not, the court gives leave, or refuſes to file the information.

The *third* method of commencing criminal proſecutions, were it commonly in practice, might indeed admit of the ſuppoſal of a diſcretionary power in the attorney-general; but this method is very rarely practiſed, and, it is believed, there has not been one inſtance ſince the revolution, where it has been followed, excepting upon a ſpecial order from the crown itſelf; ſo that this method of proſecution cannot be ſuppoſed to have been in the eye of the legiſlature, in paſſing any law whatever.

This being the caſe, it ſeems plain, that in *England* there is no room for ſuppoſing that in criminal proſecutions upon the act now under the conſideration of the court, a diſcretionary power is

veſted in any public officer, by which it ſhould be determined, whether the proſecution ſhould proceed on one or another clauſe of the ſtatute; and, if that is the caſe in *England*, there is nothing to diſtinguiſh criminal proſecutions in *Scotland* upon the act in this particular; the ſame law muſt take place throughout the whole united kingdom.

And indeed, were there any neceſſity for it, and would it not conſume too much of your Lordſhips time, it might be ſhown, that there are no *termini habiles* for ſuppoſing this diſcretionary power to take place, even in *Scotland*, tho' the law had been confined to that part of the united kingdom alone: 'Tis true it is a popular opinion, that public crimes can be proſecuted in *Scotland* by his Majeſty's Advocate only; and as few inſtances to the contrary have occurred during a long tract of time, this opinion is generally acquieſced in; but, moſt undoubtedly, in the original ſtate of our law, *quilibet e populo* might proſecute for a public crime. The people have never, by any expreſs law, been deprived of this right: On the contrary, the right of individuals ſo to proſecute, has been acknowledged and recognized by our ſtatutes of no very ancient date: Inſtances of the exerciſe of ſuch rights occur in your Lordſhips records. And Sir *George Mackenzie*, in various parts of his works, particularly in his criminals, title, *Accuſations*, § 2. and in his obſervations on the act 1587, *cap.* 76. mentions it as certain law, without indicating the leaſt doubt of it, that *quilibet e populo* may proſecute public crimes. Now, the fact here laid, as a ſpecies of *vis publica*, being an aſſault on a public officer executing his duty, is undoubtedly a public crime, and, as ſuch, may be proſecuted by *quilibet e populo*: But, on this point, the pannels forbear to enlarge, as it might lead into a diſquiſition of ſome length, not ſo very material in the preſent queſtion, as by it to conſume much of your Lordſhips time.

Thus much has been ſaid, to ſhow, that no diſcretionary power can be ſuppoſed veſted anywhere, in directing a proſecution on the clauſe of the ſtatute ſubſumed upon in the libel. With regard to the other clauſe, impoſing a mulct of 40 *l.* the matter is ſtill clearer, if poſſible.

The words of that clauſe are, that the parties ſo offending ſhall forfeit and loſe the ſum of 40 *l.* This then is clearly a forfeiture; the manner of proſecuting for which, muſt be ruled by the general clauſe, reſpecting the proſecution of forfeitures and penalties: And by that clauſe, which has been at length recited, the proſecution of ſuch forfeitures in any of his Majeſty's courts

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of record at *Weſtminſter*, or in the court of exchequer at *Edinburgh*, is permitted *cuilibet e populo*, and one half of the penalty is given to the proſecutor: From which it is plain, that neither the attorney-general in *England*, nor his Majeſty's Advocate in *Scotland*, has any concern in this matter, if a private proſecutor chuſes to follow furth the action.

Thus much has been ſaid upon the ſtatute, in ſo far as the libel is founded on that. In the *next* place, the defences which were offered againſt this libel at common law, ſhall be conſidered: And here it will be neceſſary to recapitulate ſhortly the fact, as it was ſtated from the bar, on the part of the pannels, and as they expect it will come out on proof.

About the time libelled, Mr. *Campbell*, a cuſtom-houſe officer, came to *Innerkip* with four veſſels, containing a party of about fifty men, of theſe about twenty were ſoldiers, armed as uſually the military are, with guns and bayonets, the reſt too were armed, chiefly with piſtols and cutlaſſes; they landed, and marched up to the town of *Innerkip*, where, without ſhowing any warrant, or declaring they had a legal warrant for their authority, they entered into the houſes of the town; and in the work houſe of *John Hunter*, one of the pannels, they found ſix caſks, which they ſeized as prohibited or uncuſtomed goods, and returned to their boats, aboard of which they depoſited their ſeizure ſafe, without any reſiſtance.

After this, they returned again from their boats, and ſtanding ſome time on the ſhore ſeemingly conſulting together, they marched again towards the town, where a number of the inhabitants had got out of their houſes, and were come in a crowd to behold the novelty of ſuch a number of armed men landed on the coaſt: This crowd conſiſted chiefly of women and children; ſome few men were among them, but all of them unarmed, ſome of them having only walking ſtaves in their hands, by far the greateſt part, nothing at all. Whether among this crowd of people, ſome of the women or children might take upon them to throw ſome ſtones at Mr. *Campbell* and his party, the pannels will not take upon them to affirm: Be that, however, as it will, it ſurely was no ſufficient cauſe for what followed.

Mr. *Campbell* drawing nearer to this crowd of people, made his party level their pieces, which were loaded with ball; and by this firſt diſcharge, a poor old fiſher-man, who was returning from his

his boat to the town, received four bullet wounds in his body: He fell down on the ſpot, and was conſidered as dead; his life was deſpaired of for ſome time, and he continues to this hour in ſuch a ſituation, as, in all probability, death may yet be the conſequence of his wounds.

After this general diſcharge, ſome few more ſtones were thrown; Mr. *Campbell* made his men level and fire a ſecond and a third time; by theſe diſcharges four more were wounded, particularly a woman, with a child at her breaſt, and two of the pannels: The woman received a ball thro' her wriſt, by which her hand was diſabled, and another bullet thro' her thigh: In conſequence of which wounds, ſhe was no longer able to continue nurſing the child, but obliged to give it out to be nurſed by another: One of the pannels received a bullet between two of his ribs, another of them was ſhot thro' the brawn of the leg. After this third diſcharge, the poor people of *Innerkip* fled for ſecurity; and Mr. *Campbell* having picked up a few more caſks in the fields, made ſeizure of them, and put them aboard his veſſels, without any moleſtation.

This exploit being finiſhed, Mr. *Campbell*, not ſatiated with the blood that had been ſpilt, and perhaps fearing the conſequences, ſhould he not turn accuſer himſelf, applied for a warrant againſt the pannels, which was accordingly granted him, and they were apprehended; tho' one of them, who had been wounded, was in ſuch a dangerous way, that he could not be carried to priſon, but remained in cuſtody, under a guard for a conſiderable time: At laſt, however, they were all admitted to bail, and this proſecution has been commenced againſt them.

This being the ſtate of the fact, the defences at common law againſt the libel, fall next to be conſidered.

In the *firſt* place, then, it is contended for the pannels, that Mr. *Campbell*, with his party, was *verſans in illicito*, in pretending to enter any houſe, to make ſearch for ſmuggled goods, without a warrant of a proper magiſtrate; *domus eſt tutiſſimum cuique refugium*, ſays the law, it is a ſanctuary which is not to be violated, but upon the moſt urgent occaſions, and even then it can only be *cauſa cognita* before a proper judge. No officer of the revenue has an authority veſted in him, to enter the houſes of the lieges at his pleaſure, on the contrary, he is expreſly commanded, before he attempts any ſuch thing, to apply to a proper magiſtrate, to make

oath

oath that he has received information of a concealment of ſmuggled goods; and upon that, the magiſtrate may grant a warrant for entering houſes, which is not to be executed by the officer of the revenue himſelf, but by a peace officer, and only in the day time.

At common law, an information of a concealment of ſmuggled goods, could not authoriſe any magiſtrate to grant a warrant for entering a houſe; but the law was altered in this reſpect, by the act 12. *Car.* II. which enacts, "That if any perſon or perſons, at "any time after the firſt day of *September* 1660, ſhall cauſe any "goods for which cuſtom, ſubſidy, or other duties are due or "payable, by virtue of the act paſſed this parliament, (entitled "*A ſubſidy granted to the King, of tonnage and poundage, and other "ſums of money payable upon merchandizes, exported and imported*) "to be landed and conveyed away without due entry thereof firſt "made, and the cuſtomer or collector, or his deputy agreed "with; that then, and in ſuch caſe, upon oath thereof made be-"fore the Lord Treaſurer, or any *of the barons of exchequer*, "or chief magiſtrate of the port or place where the offence ſhall "be committed, or the place next adjoining thereunto, *to iſſue out "a warrant to any perſon or perſons, thereby enabling him, or them, "with the aſſiſtance of a ſheriff, juſtice of peace, or conſtable, to en-"ter into any houſe in the day time*, where ſuch goods are ſuſpected "to be concealed; and, in caſe of reſiſtance, to break open ſuch "houſes, and to ſeize and ſecure the ſame goods ſo concealed."

Since the date of this act, warrants have been in uſe to be granted in terms thereof: And as by this act, the effect of them only extends to goods comprehended under the act of tonnage and poundage, by a clauſe in an act 14. *Car.* II. the effect of warrants of this kind iſſued from the court of exchequer, which are in that act denominated writs of aſſiſtants, is extended to all goods and merchandizes whatſoever, prohibited or uncuſtomed.

Such being the law in this reſpect, Mr. *Campbell* ought not to have entered any houſe, without producing a legal warrant, in virtue of which only he was intitled to make ſuch entry; and his doing ſo was an illegal act, which might lawfully have been reſiſted: But as no ſuch reſiſtance was made at his entry into *Hunter*'s houſe, that does not ſo properly belong to the preſent queſtion, farther than this, that as he had acted in this manner, up-

on his firſt coming to the town, it might be preſumed, he intended to have repeated the ſame illegal procedure, upon his return from the boats.

This being the caſe, it is humbly ſubmitted, whether any reſiſtance offered to him on that occaſion by the people of *Innerkip*, may not juſtly be ſaid to have been in ſelf-defence. They were entitled to reſiſt his illegal entry into their houſes; and as he had already entered illegally one houſe, his return to the town may be preſumed to have been on the like errand.

It is pleaded on the part of the proſecutor, that Mr. *Campbell* was poſſeſt of a warrant; and it was particularly condeſcended on, that he was poſſeſt of a writ of aſſiſtants.

But to this it is anſwered, that facts on the part of the proſecutor muſt be taken according to the ſhowing of the libel: That as no warrant is libelled to have been in Mr. *Campbell*'s poſſeſſion, it muſt be preſumed, that he had none, for the proſecutor cannot be allowed a proof of facts not ſet forth in the libel; the pannels being only obliged to defend themſelves againſt the libel as it ſtands, and they come to the bar prepared to do no more: And in this particular caſe, the evil tendency of a contrary doctrine muſt appear in a ſtrong point of view. For,

A writ of aſſiſtants is a writ not known in the common law of *England*, which, in revenue matters, is now our law: It was introduced by the ſtatute 12. *Car.* II. which has already been recited to your Lordſhips: And it is no where elſe mentioned, in the whole body of the ſtatutes, down to the preſent time, except in the act 14. *Car.* II. which extends the effect of it as formerly mentioned. Now, it is evident, that a variety of exceptions are competent againſt ſuch a writ: For example, it might be pleaded, that it did not proceed upon an oath previouſly made, that it was not directed to any particular perſon, or perſons, as, by an after clauſe of the act, it is enacted, that no houſe ſhould be entered in virtue thereof, unleſs it be within the ſpace of one month after the offence ſuppoſed to be committed: So, if the date of this writ of aſſiſtance ſhould happen to be a month prior to the time libelled, it is plain that it was no legal warrant to enter any houſe whatever.

This point is the rather inſiſted on, as it was ſaid at the bar, that Mr. *Campbell* was poſſeſt of a writ of aſſiſtants in common form: Now, it is well known, that an abuſe has crept into this country

country in this particular, that general writs of aſſiſtants have been iſſued, not directed to any particular perſon, or perſons, and have been lodged in many cuſtom-houſes and exciſe-offices throughout the kingdom. Theſe writs have been occaſionally made uſe of to ſcreen cuſtom-houſe and exciſe officers in entering into houſes indiſcriminately, under pretence of ſearching for ſmuggled goods: But, on the authority of the ſtatute above quoted to your Lordſhips, the pannels will plead, that all ſuch general writs of aſſiſtants are illegal and unconſtitutional; that it exceeds the power of any judge whatever to grant them; and that thoſe who uſe them, muſt do it at their peril, and cannot plead them in a court of juſtice as an excuſe for their entering any houſe contrary to law.

If the reſiſtance made to Mr. *Campbell* was a reſiſtance made to an unlawful act, he was altogether inexcuſable in attempting to make uſe of violence againſt ſuch reſiſtance, and he is anſwerable for all the conſequences thereof: Had the pannels proceeded ſtill to greater acts of violence than any they are charged with, after the firſt orders which Mr. *Campbell* gave to fire upon them, it is apprehended, that they could not have been blamed for ſo doing, even tho' the conſequence had been, that ſome of Mr. *Campbell*'s party had loſt their lives: For, as Mr. *Campbell* was ſtill *verſans in illicito*, by endeavouring, after reſiſtance had been made to an attempt, from the beginning illegal, to carry it into execution by force of arms, and, in doing ſo, had wounded and maimed innocent perſons, to the danger of their lives, the pannels, and all who were along with them, were intitled to proceed to the greateſt extremities in their own defence.

It is ſet furth in the libel, as an excuſe for Mr. *Campbell*'s outrages, that before he ordered his men to fire, he read the *Act* 1. *Geo.* I. entitled, *An act for preventing tumults and riotous aſſemblies*, &c. This, far from being an alleviation of his conduct, is an aggravation of it. He was not intitled to read the proclamation contained in that act, to any aſſembly of people whatever. The act itſelf authoriſes none to read that proclamation, who are veſted with a leſſer degree of authority than that of juſtices of peace, or chief magiſtrates of burrows; and the reading of the act itſelf ought to have put him on his guard againſt proceeding to any violence; for even thoſe who are authoriſed by that act to read the proclamation, muſt wait patiently for the ſpace of one

hour

hour after ſuch reading, before they can ſo much as apprehend any rioter, or proceed to any act of violence, in order to diſperſe the mob. This, however, was not the intention of Mr. *Campbell*; he proceeded immediately to fire on the poor people who were aſſembled together: So that it is evident, by reading this act, he meant not any thing elſe than to ſeek for a pretence to gratify his cruelty, by ſhedding human blood.

And here, the pannels will conſider this caſe in another point of view; they will even ſuppoſe, that in the beginning Mr. *Campbell* acted legally; they will ſuppoſe, that the reſiſtance that was made to him at firſt, was illegal; and they will conſider the effect that his ordering his men to fire in this ſituation of things will have upon the cauſe.

It ſeems clear, that the only pretence he can have for firing at this time, was in ſelf-defence; for it is plain, that he neither was ſuch a perſon as was authoriſed to read the proclamation in the riot act, nor did he comply with the requiſites in that act, in waiting an hour for the diſperſing of the mob; let it be conſidered then, how far his behaviour was reconcileable to the principles of ſelf-defence.

It is an eſtabliſhed maxim of law, that he who acts in ſelf-defence, muſt not exceed the *moderamen inculpatæ tutelæ*, or, in other words, he muſt go no farther than to repel the violence that threatens him; if he goes one ſtep beyond what is neceſſary for this purpoſe, he becomes an aſſailant himſelf, and thoſe againſt whom he acts, are intitled to defend themſelves in their turn. It remains, therefore, to enquire, Whether Mr. *Campbell*, on this occaſion, exceeded this *moderamen*?

On this head the pannels will recite the words of Sir *George Mackenzie*, when treating of the exceſs of the *moderamen;* and they humbly apprehend, that a better authority on the law of *Scotland* on this point, will not be aſked for. In his criminals, *title, Murder*, ſection 3d, he ſays, "This moderation is ſaid to be exceeded in theſe "three, *viz.* In arms. 2. In time. 3. In the meaſure of follow- "ing, ſtriking, *&c.* This moderation is exceeded in arms, as if "the aggreſſor have only a ſtaff, and the defender wound him "with a ſword or piſtol, the defender is in that caſe puniſhable; "for there were no reaſon in that caſe, the defender ſhould have "had any fear of his life, *nec erat in dubio vitæ conſtitutus:* And "yet this concluſion is not infallible; for, if the defender was

"much

" much weaker than the aggreſſor, he might be excuſed to uſe ſuch " unequal weapons. The defender is ſaid to exceed in time, if " he ſtrike the aggreſſor *antequam ſit in actu proximo occidendi*; for " elſe it ſhould be lawful to every man, upon the firſt apprehenſion " of fear, to kill the aggreſſor, which were very dangerous." Sir *George* then proceeds to ſtate a variety of caſes on this ſecond article of exceſs; after which he ſays, " The defender is ſaid to " exceed in the meaſure alſo, if he killed him, for wounding whom " he might have ſhunned, or if he followed the aggreſſor."

Such are the general principles of this law of ſelf defence; and the pannels will ſubmit it to the court, whether even from the ſhowing of the libel, Mr. *Campbell* has not been guilty of exceſs, in all the three ways in which it may be committed. He has uſed guns againſt people who were moſtly unarmed, and none of them armed with any thing but walking ſtaves and ſtones. He has fired upon a multitude, of which not one was *in actu proximo occidendi*. And he has choſen to mangle and wound, when his very marching up briskly to the people who were aſſembled, would have diſperſed the aſſembly.

If therefore he has committed exceſs in the *moderamen inculpatæ tutelæ*, he himſelf became the agreſſor, and thoſe whom he attacked, were entitled to act in their own defence, in return; more eſpecially, thoſe who were not concerned in offering any violence to him at firſt, but who, in conſequence of his proceedings, were indiſcriminately, with them, ſubjected to the danger of wounds and death.

By way of palliation of Mr. *Campbell*'s conduct, it is ſet forth in the libel, that the firſt time he fired over the heads of the people, the ſecond and third time he fired low, with an intention to wound, but not to kill; but this account of his conduct is neither founded in fact nor conſiſtent with law. Your Lordſhips have been told, that inſtead of firing over the heads of the people at firſt, wounds were given by the very firſt ſhots; and when a man makes uſe of a lethal weapon, the law preſumes, *præſumptione juris & de jure*, that he had an intention to kill. When ſuch is the preſumption of law, the pannels, and all others preſent, were entitled to preſume ſo likewiſe, and to conduct themſelves ſo, as men are authoriſed to do, who are in danger of immediate death.

Even upon the ſuppoſition, then, that Mr. *Campbell*'s conduct in the beginning was juſtifiable, and that the firſt reſiſtance offered

him was an illegal reſiſtance, a diſtinction muſt be made between that period of time, before Mr. *Campbell* ordered his ſoldiers to fire, and what happened after; and it muſt be proved, before the proſecutor can ſubſume againſt the pannels, that they were active in that firſt part of the diſturbance: For if they were not, as they were indiſcriminately attacked with thoſe who were really active, they were entitled to defend themſelves.

One thing the pannels will add, that they wiſh they knew a certain criterion to diſtinguiſh when Mr. *Campbell* and his aſſociates are acting in his Majeſty's ſervice, and when they go a marauding for themſelves: For the pannels can produce inſtances of ſome of them having laid hold of quantities of goods, under pretence of ſeizing them as prohibited or uncuſtomed, tho' they have never reported ſuch ſeizures in a proper manner, ſo as that the merits of them might be tried; but have thought proper to ſecret and abſtract them for their own behoof. When they act in this manner, your Lordſhips will ſurely be of opinion, that they might legally be reſiſted; and when inſtances have occurred of their having ſo acted, it ſurely ought to alleviate the puniſhment of thoſe who are found reſiſting them, tho' they ſhould be pleaſed afterwards to report the ſeizure.

Upon the whole, it is humbly apprehended, that the libel is altogether irrelevant, in ſo far as it is laid on the ſtatute 8*vo* *Geo.* I. and upon the common law, the defences proponed, for the pannels are relevant to elide it.

*In reſpect whereof*, &c.

ANDREW CROSBIE.